



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Durham Municipal Managers Association

Complainant

v.

Town of Durham

Respondent

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Case No. G-0054-1

Decision No. 2007-152

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

On September 24, 2007 the Durham Municipal Managers Association ("Association") filed a complaint alleging that the Town of Durham ("Town") violated RSA 273-A:5, I (b), (c), (e), and (i), when the Town issued notice that it intends to implement a "reorganization" of the fire department that would create new non-bargaining unit positions. The Association alleges that these new positions that would effectively replace certain existing bargaining unit positions. Specifically, the Association argues that the planned "Lieutenant" rank would operationally perform the same function as the existing "Captain" rank except that the Lieutenant position would be outside of the bargaining unit and would receive a reduced level of compensation. Likewise, the Association states that the Town is planning to replace the existing "Fire Marshal" bargaining unit position with a "Division Chief of Fire Prevention and Safety" who would perform analogous duties to those of the Fire Marshal. The Association claims that the Town has failed to negotiate in good faith over the proposed changes to the fire department staffing.

As remedies, the Association requests that the PELRB: 1) declare that the Town of Durham has committed an Unfair Labor Practice; 2) issue a cease and desist order; and 3) grant such other and further relief as may be just and equitable.

The Town filed its answer denying the charges on October 4, 2007. The Town contends that the Association's complaint must be dismissed because it is premature and the Town's actions are well within its managerial rights granted under RSA 273-A:1, XI. The Town states that it has the exclusive managerial right and statutory authority to reorganize its fire department, which includes the right to create and abolish positions. Additionally, the Town claims it has the right to establish the terms and conditions of employment for newly created positions unless

For the Town:

1. Burt Matheny, Captain
2. Peter O'Leary, Fire Chief
3. Todd Selig, Town Administrator
4. Other witnesses to be determined

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party.

EXHIBITS

For the Association:

1. Collective Bargaining Agreement
2. Any and all documents filed as exhibits to pleadings
3. Any and all exhibits listed on Respondent's Exhibit list
4. Any and all pleadings in this matter

For the Town:

1. Reorganization Proposal drafted by Burt Matheny, Fire Captain
2. Other documents to be developed

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted in accordance with Pub 203.02. It is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

LENGTH OF HEARING

The time being set aside for this hearing is 3 hours. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least 20 days prior to the date of the evidentiary hearing.

those positions are identical to those already included in the bargaining unit. The Town also claims the right to make the initial determination as to whether a new position is managerial in nature and is not compatible with positions in an established bargaining unit.

The Town does not dispute its obligation to discuss with the Association whether a newly created position should be included in the bargaining unit. However, the Town maintains that any such obligation does not arise until after the creation of the position. The Town states that the alleged reorganization that serves as the basis for the Association's complaint is only a proposal at this point in time that is still awaiting a final decision from the Town Administrator.

Accordingly, the Town requests that the PELRB: 1) dismiss the complaint as premature; 2) dismiss the complaint as failing to state a claim which is not an incursion into reserved as the sole and exclusive domain of the Town; 3) grant the Town its fees and costs for having to defend against a premature ULP complaint; and/or 4) grant the Town its fees and costs for having to defend against a complaint that the Association knew or should have known had no legal basis; and 5) grant such other relief as it may deem just.

The undersigned hearing officer conducted a pre-hearing conference at the PELRB in Concord on October 22, 2007.

PARTICIPATING REPRESENTATIVES

For the Association: John S. Krupski, Esq.

For the Town: J. Joseph McKittrick, Esq.

ISSUES FOR DETERMINATION BY THE BOARD

- (1) Whether the Town has improperly reorganized the fire department to replace existing bargaining unit positions with new non-bargaining unit positions?
- (2) Whether the Association's complaint is premature?

WITNESSES

For the Association:

1. Michael Hoffman, Captain
2. Richard Miller, Captain
3. Peter O'Leary, Fire Chief
4. Thomas Stano, Captain, Association President
5. Rebuttal Witnesses
6. Any and all witnesses on Respondent's witness list

DECISION

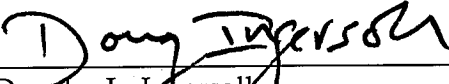
1. At the pre-hearing the parties were able to stipulate that the Fire Marshall position has been eliminated and the position of Division Chief, Fire Prevention and Safety, established. The Town also stated that the new Division Chief position should not be included in the existing bargaining unit. The parties dispute whether the disputed lieutenant positions have been created, with the Association claiming the evidence establishes that the positions have been created and the Town asserting that the Town Administrator has yet to make a final decision concerning the creation of these positions.
2. As discussed at the pre-hearing conference, the hearing in this matter is rescheduled to December 13, 2007. Among other things, a December 2007 hearing date should provide the parties with sufficient time to attempt to reach agreement on relatively complicated matters such as the nature and extent of Town action required to formally establish the lieutenant positions for purposes of a proceeding like the instant case and whether a modification proceeding might be a means to address the Association's concerns, if necessary, in the event the Town does not ultimately agree to the inclusion of the positions of lieutenant or division chief in the bargaining unit.
3. The parties' representatives shall meet, or otherwise confer, on or before November 30, 2007, to attempt to stipulate to the submission of this case in writing or, in the alternative, without the need for formal testimony. The parties shall file forthwith a joint statement setting forth any such agreement and include a proposed schedule for the parties' filings.
4. If the matter is to proceed to a hearing, counsel shall meet, or otherwise confer, on or before November 30, 2007 in order to agree on joint exhibits and to compose a mutual statement of agreed facts. The parties' shall file all joint exhibits, factual stipulations, and other exhibits properly marked for identification on or before December 7, 2007. If these materials are submitted electronically the parties do not have to otherwise file the original and five copies.
5. Counsel shall file any amendments to, or deletions from, their Witness and Exhibit lists, as detailed above, at least 5 days prior to the scheduled hearing date.
6. The parties shall file any additional preliminary, procedural or dispositive motions no later than November 15, 2007, and any responses or objections thereto shall be filed on or before November 28, 2007.
7. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an adjudicative hearing between the parties will be held on:

December 13, 2007 @ 9:30 a.m.

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire.

So ordered.

October 22, 2007.



Douglas L. Ingersoll
Staff Counsel/Hearing Officer

Distribution:

John S. Krupski, Esq.

J. Joseph McKittrick, Esq.